

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

INDIANAPOLIS

OFFICE MEMORANDUM

Date: August 18, 2008

To: Dan Murray, Assistant Commissioner, OAQ

From: Ann Long, Attorney, OLC *ASL*

Through: Robert Keene, Assistant Commissioner, OLC and EPA *RR*

Copy: Scott Deloney, Branch Chief, Air Programs, OAQ; Pat Troth, Section Chief, OAQ

Subject: CLARK and FLOYD COUNTIES, INDIANA
CLEAN AIR ACT 110(I) DEMONSTRATION; LEGAL AUTHORITY
FOR I/M PROGRAM TO BE RE-IMPLEMENTED AS A
CONTINGENCY MEASURE

IDEM has been asked by EPA to explain how the applicable statutory procedure for implementation of a vehicle inspection and maintenance (I/M) program for Clark and/or Floyd counties works in conjunction with the SIP submittal to satisfy the requirements of 40 CFR 51.372(c)(1) through (c)(4), such that I/M would be a viable contingency measure for the attainment maintenance plan.

The applicable statutory procedure is contained in Indiana Code (IC) 13-17-5-9(d). We believe that this statute authorizes Indiana to timely implement I/M whenever necessary as a contingency measure, and provide the following analysis.

IC 13-17-5-9(a) and (b) state that after December 31, 2006 the Indiana Air Pollution Control Board may not adopt a rule that requires the inspection and maintenance of motor vehicles in Clark and Floyd counties. The rule language at 326 Indiana Administrative Code (IAC) 13-1.1 that required inspection and maintenance of motor vehicles in those two counties was voided by the statute. The I/M program rule was formally amended to exclude Clark and Floyd counties in 2007.

IC 13-17-5-9 (c) and (d) set out the procedure under which the state budget agency may approve [re-]implementation of a I/M program in the one or both of the counties. I/M in Clark and/or Floyd counties can only be implemented after the budget agency determines that implementation of a I/M program is necessary to avoid a loss of federal highway funding for the state or a political subdivision. The phrase "loss of federal highway funding" refers to a sanction imposed under 40 CFR 52.31, (a sequence of notifications and ensuing mandatory sanctions for deficiency findings made pursuant to section 179 of the Clean Air Act), which outlines the consequences to the states for, among other possible findings of deficiency, an EPA finding that any requirement of an approved SIP revision is not being implemented.

40 CFR 51.372 (c) states that any nonattainment area that EPA determines would otherwise qualify for redesignation from nonattainment to attainment shall receive full approval of a SIP submittal if the submittal contains the following elements:

- (1) *Legal authority to implement a basic I/M program as required by this subpart. The legislative authority for a I/M program shall allow the adoption of implementing regulations without requiring further legislation.*

IC 13-17-5-9 (d) complies with this element. Subsection (d) is self executing in that the state budget agency is delegated authority to approve implementation of an I/M program upon making a determination that certain conditions exist. The budget agency approval will trigger rulemaking and contractual processes within IDEM for which the department has long standing statutory authority. No return to the legislature for additional authority to implement I/M is required or needed.

- (2) *A request to place the I/M plan (if no I/M program is currently in place or if an I/M program has been terminated) into the contingency measures portion of the maintenance plan upon redesignation.*

As an example of such a request, in 2006 IDEM revised the 8-Hour Redesignation Petition and Maintenance Plan for Clark and Floyd counties in order to move the I/M program from Section 6.2 where it was listed as a measure to remain in place over the course of the maintenance plan, to Section 8.0 where it is listed as a contingency measure. Within the request, IDEM stated that the revision resulted from the amendment of IC 13-17-5 eliminating the I/M program, which amendment is the subject of this letter. That request and Indiana's SIP revision was approved effective July 9, 2007.

IDEM will continue to make this request in the appropriate submittals for Clark and Floyd counties.

- (3) *A contingency measure consisting of a commitment by the Governor or the Governor's designee to adopt or consider adopting regulations to implement an I/M program to correct a violation of the ozone or CO standard or other air quality problem, in accordance with the provisions of the maintenance plan.*

The IC 13-17-5-9 (d) procedure allows this commitment to be successfully made in a SIP submittal. The state budget agency has been statutorily designated to consider

and approve implementation of a I/M plan for Clark and/or Floyd counties when needed to avoid a loss of federal highway funding.

A violation of the criteria pollutant standard as described in the Commitment for Contingency Measures within the IDEM submittal is the event that would prompt an Action Level response, including consideration of adopting rules/making contracts to implement I/M. If I/M is found to be an appropriate and effective measure, IDEM would notify the budget agency of the need to consider and approve implementation of I/M to avoid losing federal highway funding, and provide the sanction clock timeline of 40 CFR 52.31 as well as the IDEM rulemaking and contractual process timeline and the commitment made in the submittal (see 18 month deadline discussion below), to the budget agency. This ensures that the budget agency's approval is made timely so as to avoid imposition of the highway funding sanction.

(4) A contingency commitment that includes an enforceable schedule for adoption and implementation of the I/M program, and appropriate milestones. The schedule shall include the date for submission of a SIP meeting all of the requirements of this subpart. Schedule milestones shall be listed in months from the date EPA notifies the state that it is in violation of the ozone or CO standard or any earlier date specified in the state plan. Unless the state, in accordance with the provisions of the maintenance plan, chooses not to implement I/M, it must submit a SIP revision containing an I/M program no more than 18 months after notification by EPA. IC 13-17-5-9 (d) allows compliance with this element through the contingency commitment. This would be accomplished by a state action timeline, with milestones, that would proceed from the date of the EPA notification to the date of adoption of a rule to implement I/M.

The eighteen month deadline for the SIP revision dictates that the highway funding sanction will be avoided. Under 40 CFR 52.31(d), a sanction clock is started by a (c)(4) finding by EPA. 40 CFR (d) provides that an offset sanction shall apply in an affected area 18 months from the date when the administrator makes a finding under (c). The loss of federal highway funding sanction applies 6 months from the date the offset sanction applies. For findings under (c) (4), the date of the finding is the effective date as defined in the final action triggering the sanction clock. This is a two year plus process as compared to the 18 month SIP revision process set out in (4).

In summary, the Indiana statute authorizes Indiana to timely implement I/M whenever necessary as a contingency measure. Understanding this is a matter of looking at the specific language of the statute and the relevant federal regulations for the steps that would be taken by IDEM after the decision to implement I/M as a contingency measure in conjunction with the federal sanctions process.

